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FILED
JUN 27 1964
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 157

AMERICAN EXPORT LINES, INC.,
Petitioner,

v.

HOWARD ALI AMMAR,
Respondent.

REPLY BRIEF OF PETITIONER

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Statement

The brief of respondent glosses over the fact that respondent was not even fit for sea duty at the time of his motorcycle accident (Appendix B, 5a, Appendix Record, Vol. I, p. 50a). Beyond this neither the U. S. Public Health Service nor Dr. Francis A. Echlin, who had examined respondent, and whose reports were furnished to respondent's counsel, had pronounced him cured, notwithstanding the repeated inferences to the contrary contained in respondent's brief on pages 3 and 14. Respondent had been found fit for sea duty; never fit for motorcycle riding.

Secondly, respondent's attempt to muddle the real issue of the necessity of a proper charge as to interpretation of the applicable legal principles, inferentially sustains peti-

tioner's argument. Otherwise the issue would have been met squarely.

Finally, respondent attempts to raise for the first time entirely without foundation below the question of medical records without referring to any portion of the record where any medical records were requested by the U. S. Public Health Service or where any Public Health Service physician either testified or indicated that crude shipboard tests would be necessary in addition to the hospital tests available at a Public Health Service Hospital.

In fact neither the prior U. S. Public Health Service treatment records nor the Bay View General Hospital records covering respondent's hospitalization immediately after the motorcycle accident were requested by or forwarded to the U. S. Public Health Service Marine Hospital in Staten Island, where the final diagnosis was made.

Argument

The real issue is whether in a Jones Act case this Court will permit an issue vital to the case to be withheld from the jury. This question, of course, was whether a jury may speculate in attributing a motorcycling accident, caused 50% by plaintiff's negligence, to an earlier shipboard accident without regard to accepted principles of causation. Whether this question is couched in terms of foreseeability, intervening cause or avoidable consequences, the fact remains that in its motion and requests to charge petitioner took the position that if respondent was entitled to recover for negligence, then, the damages should be determined according to the principles of reasonable foreseeability, avoidable consequences, and intervening cause. This was raised by requested instructions, all of which were expressly denied by the trial Judge (Appendix, Record,

Vol. I, p. 149a). To contend, as respondent does in his brief on pages 4 and 15, that in failing to identify request #14 as one made under the doctrine of avoidable consequences, petitioner failed to make a proper request, is but to beg the question. Petitioner's request #14 succinctly recited this doctrine:

> "If you find that under the circumstances, the riding of the motorcycle was negligent, then you must find for the defendant with respect to the damages flowing from the second accident." [Appendix Record, Vol. I, p. 121a]

Respondent's interpretation of the doctrine of avoidable consequences is at variance with all of the leading text writers cited in the petition at page 10. Moreover, respondent's likening of petitioner's interpretation to the old common law concept of contributory negligence is patently fallacious. Clearly, under the doctrine of avoidable consequences plaintiff's recovery is not totally barred, only that portion of the damages attribuable to his failure to exercise due care. In the instant case, respondent is entitled to the damages suffered as a result of the shipboard accident, and petitioner has never argued to the contrary.

Respondent has lost sight of the application of *Kernan* v. *American Dredging Co.*, 355 U. S. 426, to this case and in particular with the principles under the Federal Employers' Liability Act incorporated by reference in the Jones Act, 35 Stat. 65, as amended, 45 U. S. C. 51-60, 41 Stat. 1007, U. S. C. 688 which likens the liability of an employer under the FELA and the Jones Act to an employer in workmen's compensation. The majority opinion is especially specific at pages 431-432 where it points out that as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees for losses occasioned by

the inevitable injuries of industrial employment. This change, in most industries, has been embodied in Workmen's Compensation Acts and in the railroad and shipping industries by the FELA and the Jones Act. However, compensation liability has been specifically limited by the State of New York in *Sullivan* v. *B & A Construction Co.*, 307 N. Y. 161 (1954) to liability for accidents incurred at or because of work, not to accidents occasioned primarily by the employee's own negligence in operating motor vehicles.

The jury's answers point out the substance of petitioners arguments. Had the instructions been proper, the answers indicate the verdict would have been different. Petitioner sharply challenges the improper instructions given the jury following the submission of all the evidence. In referring to the charge of the trial Judge, respondent in the second quoted paragraph on page 11 of his brief, sets forth the general definition of negligence as given by the trial Judge, with which petitioner has no quarrel. It is the third quoted paragraph on page 11, containing the specific instructions to the jury as to how they should apply the general law to the specific facts of the case that creates the error. This paragraph permitted the jury to find liability absent the essential ingredient of reasonable foreseeability. For in this instruction, the trial Court said that if you find plaintiff did "blackout" by reason of the injuries sustained aboard ship, then you may find defendant negligent. Obviously this bare instruction did not permit the jury to consider, in arriving at its finding of negligence, the fact that others may have directly caused the accident by loaning respondent the motorcycle or that respondent failed to exercise due care in boarding the motorcycle. Moreover, respondent's already tenuous argument is rendered weaker by the opinion below, which concedes petitioner's point that this question was, in fact,

withheld from the jury (Petition, p. 7a). While petitioner disagrees with the remainder of the opinion below, there is no question that the jury was not permitted to consider this aspect of the case. The case of *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U. S. 500 (1957), which is cited as the authority for withholding this question from the jury, is an inappropriate authority for this proposition, since this Court in *Rogers* did not even consider the question of "remote" or subsequent damages, and the injured railroad worker in *Rogers* was not involved in a subsequent accident.

Point III of respondent's brief (p. 18) is a plea for extraordinary relief in that it seeks to compound the error below without having raised an appealable point. Respondent argues that since plain error was committed in permitting the jury to reduce the damages flowing from respondent's motorcycling accident, the full damages should be restored. However, as pointed out in the opinion below (Petition p. 10a), if the court below had acted on this error, then it would have been required to take the next logical step and completely bar this aspect of the recovery.

Respondent did not except to the trial court's instructions to the jury nor did he submit any request to charge embodying his erroneous interpretation as to the rights of the parties with respect to the motorcycling accident damages. Nonetheless as stated in the opinion below, a decision on the question of the applicability of comparative negligence principles to subsequent damages is implicit in the analysis of the problem of remoteness of damages by the court below (Petition p. 10a). While the petitioner contends that if proper instructions had been given this question would not have been reached, petitioner throughout the trial urged that if plaintiff's own negligence caused or contributed to the motorcycle accident that should preclude him from recovery of any of the increased related damages (Appendix Record, Vol. I, pp. 121a, 124a, 149a).

As to the importance of a charge the function of a Court is not to reweigh evidence, *Sentilles* v. *Inter-Caribbean Shipping Corp.* 361 U. S. 107, rather it is to give a proper charge so the jury's verdict can be in accordance with the law.

In conclusion, respondent's argument urges this Court to forge a rule of law which would permit a seaman injured aboard ship to carry on his life thereafter with complete abandon. While at first blush the awarding of substantial damages to an injured seaman has a certain appeal, the underlying policy considerations are manifest. The principles of social responsibility demand that following an accident the injured party must exercise reasonable care for his own safety, especially where the shipowner is no wise in a position to prevent the subsequent accident.

Dated: New York, N. Y., June 26, 1964.

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